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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-869

BOOTSTRAP TRADING CO., INC.,

Petitioner,

vs.

PHOENIX TALLOW COMPANY and MARICOPA BY-PRODUCTS, INC.,

Respondents.

Brief of Respondent Phoenix Tallow Company in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The decision of the court below to dismiss Bootstrap's appeal was clearly within its discretionary jurisdiction under Rule 12(c) of the Federal Rules of Appellate Procedure. Thus, no basis for review by this court has been shown.

Opinions Below.

The opinions and orders of the Arizona District Court and the Court of Appeals for the Ninth Circuit are unpublished. They are correctly set forth in the Appendices to the Petition.

Statement.

The relevant facts, which are stated in part in the opinion of the Arizona District Court (App. pp. 7-9)

and in the petition (Pet. pp. 8-16) may be briefly summarized.

After a judgment upon a directed verdict was entered against Petitioner, Bootstrap Trading Co., Inc., an Arizona corporation (Bootstrap) on February 1, 1972, in its suit for damages under the antitrust laws against respondents Phoenix Tallow Company (Phoenix Tallow) and Maricopa By-Products, Inc. (Maricopa), and Bootstrap's motion for a new trial was denied on May 8, 1972, Bootstrap commenced its appellate proceedings in a highly unusual manner. It did not file a notice of appeal under 28 U.S.C. §2107 with a $5.00 filing fee pursuant to 28 U.S.C.A. 1917, but, instead, on May 25, 1972, Bootstrap "lodged" a notice of appeal and simultaneously filed a motion for leave to appeal *in forma pauperis.*

Bootstrap is an Arizona corporation and its moving papers contained no case law or statutory authority holding that a corporation has the right to appeal *in forma pauperis.* Bootstrap's motion contained only a single affidavit of its majority stockholder and principal officer, Emil Kohn (Kohn) purporting to allege facts showing his inability to pay the cost of the appeal. The corporation had at least two stockholders with substantial assets, and many creditors who each had a substantial financial stake in the success of Bootstrap's appeal. No other officer, director, stockholder or creditor filed any affidavit as to financial inability to finance the appeal.

Phoenix Tallow and Maricopa opposed Bootstrap's motion for leave to appeal *in forma pauperis* and in this connection copies of earlier affidavits by Kohn were filed which uncovered the fact that Kohn had receipts

and earnings which he had not disclosed, and that he had property whose value he had understated.[1]

On June 12, 1972, the date set for the hearing of Bootstrap's motion for leave to appeal *in forma pauperis*, Bootstrap withdrew the motion. (Pet. p. 10.)

As of the date the motion was withdrawn, thirty-four days had already elapsed after the entry of the order denying a new trial on May 8, 1972. Eight days later, on June 20, 1972, Bootstrap paid the $5.00 filing fee and its earlier "lodged" notice of appeal was filed. (Pet. App. G, p. 39.)[2]

Rule 10(b) of the Federal Rules of Appellate Procedure (App. A, p. 2) required that, within ten days after filing a notice of appeal, Bootstrap order a transcript of such parts of the proceedings not already on file which Bootstrap deemed necessary for inclusion in the record. It also required that Bootstrap make satisfactory arrangements with the reporter for payment of the costs at the time the transcript was ordered.

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[1]See Motion to Appeal *in forma pauperis* filed 5/25/72; Response of Defendant Maricopa to Plaintiff's Motion for Leave to Appeal *in forma pauperis*, dated 6/6/72; Motion of Phoenix Tallow to Dismiss Appeal, dated 8/31/72.

[2]It is arguable that this "filing" on June 20, 1972, forty-two days after the denial of the motion for a new trial, was out of time under the thirty day jurisdictional requirement of 28 U.S.C.A. §2107, although neither the District Court or the Court of Appeals so held. Bootstrap argues (Pet. pp. 9-10) that it is saved from this result because it timely "lodged" a notice of appeal on May 25, 1972, although without the $5.00 fee, (*Parissi v. Telechron*, 349 U.S. 46 (1955) and on the same date filed its motion for leave to appeal *in forma pauperis* (*Tesciona v. United States*, 206 F.2d 479 (D.C. 1953). Since Bootstrap concedes that it intentionally failed to file the $5.00 fee (Pet. p. 9) and *Parissi* involved an inadvertent failure to pay the filing fee, *Parissi* may not be applicable. Moreover, Bootstrap's withdrawal of its motion to appeal *in forma pauperis*, after the credibility of Kohn's affidavit was attacked, might vitiate the status of that motion which, where it is bona fide, is customarily treated as the equivalent of a notice of appeal.

Rule 11(a) of the Federal Rules of Appellate Procedure (App. A, p. 4) emphasized this requirement by providing that after filing the notice of appeal "the appellant shall comply with the provisions of Rule 10(b). . . ." Bootstrap did not order the reporter's transcript and did not make arrangements to pay for the transcript at any time. (Pet. App. F, p. 8.)[3]

Rule 11(a) of the Federal Rules of Appellate Procedure (App. A, p. 4) required that the entire record, including the reporter's transcript and the clerk's transcript, be transmitted to the Court of Appeals within forty days after the filing of the notice of appeal. The record was not transmitted by Bootstrap within the forty days, or at any time.[4]

Rule 12(a) of the Federal Rules of Appellate Procedure required Bootstrap to docket its appeal in the Court of Appeals initially within the same forty day period allowed for the transmission of the record. (App. A, pp. 7-8.) Docketing an appeal involves the payment of a filing fee only. Bootstrap did not docket the appeal within the forty day period.

Rule 7 of the Federal Rules of Appellate Procedure required Bootstrap to file a cost bond on appeal "with the notice of appeal". (App. A, p. 1.) The cost bond filed by Bootstrap on June 20, 1972 in response to the court's order of June 12, 1972 (Pet. App. G, p. 39)

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[3]Since Bootstrap never ordered the transcript or made arrangements for payment thereof at any time, it is irrelevant, for this purpose, whether the ten day period began to run from May 25, 1972, the date Bootstrap's notice of appeal was lodged and its abortive *in forma pauperis* motion was filed, or June 12, 1972, when its motion was withdrawn, or June 20, 1972, when its earlier lodged notice of appeal was filed.

[4]The principal and overriding default was failure to order or make arrangements to pay for the reporter's transcript which frustrated any further proceedings on appeal.

was void in that it failed to comply with the conditions required by Rule 7. (Pet. App. G, p. 40.)

Four days prior to the time when the record was required to be transmitted to the Court of Appeals, as reckoned by the District Court, Bootstrap filed its motion to extend the time.[5]

Bootstrap's motion in the district court for an extension of time to transmit the record was denied. The court reviewed the history of events from February 9, 1972, when Bootstrap's motion for a new trial had been denied, Bootstrap's motion to proceed *in forma pauperis*, and its motion to extend the time to transmit the record. In this connection, the court stated:

> "Supporting the plaintiff's motion to secure a transcript without payment of cost was only Mr. Kohn's (president of plaintiff corporation) affidavit. Defendants filed objections together with an affidavit and relevant information from Kohn's state court divorce action casting serious doubt upon the truthfulness of Kohn's affidavit as to his assets and inability to pay for a transcript. Mr. Kohn did not contest defendants' allegations and on June 12, 1972, plaintiff summarily withdrew its motion. The Notice of Appeal was filed June 20, 1972. A transcript was not ordered within ten (10) days thereafter. Rule 10(b) Federal Rules of Appellate Procedure.

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[5]The district court for cause shown had power to act only within 40 days from the filing of the notice of appeal. (Rule 11(d) Federal Rules of Appellate Procedure (App. A, pp. 5-6).) If the forty days began to run on June 12, 1972 when Bootstrap's motion for leave to appeal *in forma pauperis* "was determined" by its withdrawal, then even Bootstrap's motion lodged July 27, 1972 was too late. The district court, however, gave Bootstrap the benefit of the doubt when it assumed that the time began to run on June 20, 1972 when Bootstrap's earlier lodged notice of appeal was "filed". (Pet. App. G, p. 39.)

> In plaintiff's application for extension of time lodged on the thirty-seventh day after filing of the Notice of Appeal it is recited that the estimated cost of transcript is $2600.00 and that arrangements had been made to pay the entire $2600.00 in order to effectively 'order' the transcript. The Clerk's records indicate that on July 26, 1962, Kohn deposited with the Clerk the sum of $2400.00 to be held for payment of the transcript. The transcript has still not been effectively 'ordered'.
>
> It is ordered that the motion for extension of time to file transcript is denied." (Pet. App. F, pp. 8-9.)

Bootstrap then filed a motion in the Court of Appeals for an order to docket the appeal out of time.[6]

Phoenix Tallow and Maricopa filed motions to dismiss the appeal under Rules 12(c) and 3(a) of the Federal Rules of Appellate Procedure. With the full and complete record before it, the court denied Bootstrap's motion to docket the appeal out of time and granted respondents' motion to dismiss the appeal under Rule 12(c) which provides that an appeal shall be dismissed "if the appellant shall fail to cause timely transmission of the record or to pay the docket fee. . . ." (App. A, p. 8.)[7]

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[6]This was the only relief requested in Bootstrap's motion.

[7]On September 14, 1972 when the Court of Appeals entered its first order it had before it (a) all of the arguments presented by Bootstrap in support of its motion for an extension of time to file the record, (b) the Maricopa motion to dismiss and Bootstrap's opposition thereto, and (c) the motion to dismiss by Phoenix Tallow which substantially duplicated the Maricopa motion. Bootstrap's response to the Phoenix Tallow motion, which was filed on September 14, 1972, was reconsidered by the Court of

ARGUMENT.

The Court of Appeals denied Bootstrap's motion to docket the appeal out of time and granted respondents' motions to dismiss the appeal on the express grounds of Rule 12(c) of the Federal Rules of Appellate Procedure. The undisputed facts presented to the Court of Appeals were:

1. That Bootstrap failed to order the reporter's transcript timely, or at all and failed to make satisfactory arrangements with the reporter for payment of the cost of the transcript, in violation of Rule 10(b).[8]

2. That Bootstrap had failed to timely transmit the record or to make it possible to transmit the record on appeal within the time required by Rule 11(a).

3. That Bootstrap had failed to timely docket the appeal in the Court of Appeals without any lawful reason in violation of Rule 12(a).

4. That Bootstrap had failed to timely post a bond required by the rules but, instead, had posted a bond that was void on its face, in violation of Rule 7.

Appeals so that *all* of its arguments were given due attention. The court treated Bootstrap's second opposition as a motion to set aside its order of September 14, 1972 and reaffirmed its decision dismissing the appeal. (Pet. App. B, p. 2.)

[8]Although counsel later stipulated that the record, when prepared, could be retained in Phoenix pending the writing of briefs, Rule 11(c) expressly provided that in such event, the appellant must comply with Rule 12(a) (docketing) "and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries accompanied by a certificate of counsel for the appellant . . . reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal." (Rule 11(c), Federal Rules of Appellate Procedure. (App. A, p. 5).) Bootstrap's acts and omissions made compliance with Rule 11(c) impossible.

Clearly, on this record, the Court of Appeals had the discretion under Rule 12(c) to dismiss Bootstrap's appeal. Many other cases have held that the failure to transmit the record on appeal within the time limits provided by the rules fully warrants an appellate court in dismissing an appeal. *Tucker Products Corporation v. Helms,* 171 F.2d 126 (9th Cir. 1948); Cert. den. (1949) 336 U.S. 938, 69 S. Ct. 748, 93 L. ed. 1096; *United States v. Stanton,* 172 F.2d 642 (9th Cir. 1949); *Maghan v. Young,* 154 F.2d 13 (D.C. 1946); *United States v. Krause,* 197 F.2d 329 (9th Cir. 1952); *Fong v. James W. Glover, Ltd.,* 197 F.2d 710 (9th Cir. 1952); *United States v. Fujisaki,* 198 F.2d 747 (9th Cir. 1952); *Hagan v. Whitman,* 356 F.2d 742 (9th Cir. 1966); *United States v. Lathrop,* 199 F.2d 954 (9th Cir. 1952); and *Hargraves v. Bowden,* 217 F.2d 839 (9th Cir. 1954).

The appeals were dismissed in each of these cases although none of them involved as many braaches of the rules as were committed by Bootstrap in the instant case. Thus, in *Tucker Products Corporation v. Helms, supra, United States v. Stanton, supra, Maghan v. Young, supra* and *United States v. Fujisaki, supra,* the only breach of the rules established was the failure to timely transmit the record. There was no showing, for example, as in the instant case, that, in addition, the appellant had failed to order or pay for the reporter's transcript. Nor were the breaches of the rules in the cases cited above as flagrant and as unjustifiable as those committed by Bootstrap in the instant case. As was evident from the documents filed in the District Court, the judgment on the directed verdict was granted on February 1, 1972 and Bootstrap's motion for a new trial was denied on May 8, 1972. Bootstrap

first adopted the stratagem of attempting to have the United States Government pay for its appeal by filing a frivolous motion for leave to appeal *in forma pauperis,* without any proof that substantial stakeholders in Bootstrap's assets could not finance the appeal, and with an affidavit by its president which was so flimsy that when an opposing affidavit was filed attacking its truthfulness, Bootstrap did not contest the allegations and summarily withdrew its motion. When this ploy failed, Bootstrap continued to delay the determination of the appeal by failing to order the transcript or to pay the court reporter.

Thereafter, the record discloses that Bootstrap made no application for an extension of time to transmit the record on appeal until after the trial court had lost jurisdiction. Thus, Bootstrap's motion for an extension of time in the trial court was lodged sixty-three days after its motion for leave to appeal *in forma pauperis* was filed on May 25, 1972, and forty-five days after its motion to appeal *in forma pauperis* was withdrawn on June 12, 1972. Thus it was clearly filed out of time.[9]

Bootstrap's failure to timely docket the appeal in the Court of Appeals and the filing of a void bond have already been described.

Thus, in the face of the long line of decisions wherein appellate courts have dismissed appeals only for failure to timely transmit the record and the undeniable applicability of those decisions to the facts in the in-

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[9]Bootstrap contends that the filing of a motion to appeal *in forma pauperis* is the legal equivalent of filing of a notice of appeal. (See authorities cited in footnote 2 *infra*). Determination of that motion, by its withdrawal, would clearly start the running of the 40-day jurisdictional period during which the trial court is authorized to extend time for transmittal of the record. Rule 11(c), Federal Rule of Appellate Procedure.

stant case, the petition is clearly blind when it asserts that the "Question Presented" is whether the court below "departed from *accepted* and *usual* judicial practice . . ." by granting the instant motion to dismiss the appeal. Indeed, the decision below was inevitable.

Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695 (1947), the principal case relied upon by Bootstrap, in fact supports the Court of Appeals here. This Court reiterated the principle that the earlier version of Rule 12(c), *i.e.,* old Rule 73(a) "is intended to place reliance upon the sound discretion of the Circuit Court of Appeals". (330 U.S. 695, at 704.) It was precisely the exercise of that same discretion to which reference was made in *Pyramid Motor Freight Corp., supra,* in accordance with the long line of decisions cited earlier, which led the court below to dismiss Bootstrap's appeal.

The petition is wrong when it devotes itself to an endless, and irrelevant discussion of Bootstrap's version of the evidence in the lengthy trial in the District Court. As shown by its motion for directed verdict, Respondent denied and denies that any violation of Section 1 or Section 2 of the Sherman Act was established below, even *prima facie*. The petition is also clearly wrong in its distorted version of what Bootstrap asserts are substantial questions on the merits which might have been litigated on the appeal if the rules on appeal had been followed, not flaunted.[10]

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[10]The directed verdict in the District Court was based, in substantial part, upon the simple proposition that Bootstrap failed

Bootstrap having clearly violated the rules on appeal, the court below had the discretion to determine whether it would dismiss the appeal. It had all the facts before it. After balancing all of the issues, the court held that the appeal should be dismissed. That decision was clearly within its power and was even more clearly correct.

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to offer any proof that it was injured or damaged in its business or property. It was conceded on stipulated facts that the unit cost of operation of Bootstrap's plant, because of its inefficient design and inexperienced management, was far greater than the per unit cost of operation of its competitors. Bootstrap's damage problem was similar to that of an owner who breeds a three legged horse and mounts it with a Russian weight lifter. That owner cannot claim the Kentucky Derby prize as damages, no matter what its proof that the four legged horse owners prevented it from competing. All the evidence in the world as to purses earned or times run by four legged horses would not permit a trier of fact to award a single dollar to the owner of a three legged horse. No "expert" would be permitted to testify that a three legged horse could beat Man-a-War regularly. The trial court thus directed a verdict, in part, upon the grounds that the "evidence" relied upon by Bootstrap had no rational relationship to the damage which it sought. The court's decision was in accordance with a long line of decisions to the same effect. Thus, the so-called "substantial questions" and the decisions pertaining thereto referred to in the petition, pages 24 through 30, are and would have been totally inapplicable. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, (9th Cir. 1969) 416 F.2d 71; *Herman Schwabe, Inc. v. United Shoe Machinery Corp.* (2 Cir. 1962) 297 F.2d 906; *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.* (6 Cir. 1962) 308 F.2d 383; *Emich Motors Corp. v. General Motors Corp.* (7 Cir. 1950) 181 F.2d 70, modified on other grounds (1951) 340 U.S. 558; *Wolfe v. National Lead Company* (9 Cir. 1955) 225 F.2d 427; *Flintkote Co. v. Lysfjord*, (9 Cir. 1957) 246 F.2d 368; and *Lessig v. Tidewater Oil Co.* (9 Cir. 1964) 327 F.2d 459. Finally, Bootstrap's loss of its investment admittedly resulted from a fire and, as a matter of law, could not be the basis of a claim against its competitors.

Conclusion.

The decision below is thus consistent with the authorities and plainly right. No basis for review by this court has been shown. The petition should therefore be denied.

Respectfully submitted,

JACK CORINBLIT,
S. DELL SCOTT,
Counsel for Respondent Phoenix Tallow Company.

CORINBLIT & SHAPERO,
GILLEN, SCOTT & ALPERSTEIN,
Of Counsel.

Dated: January 12, 1973.

APPENDIX A.

Federal Rules of Appellate Procedure.

Rule 7.

Bond for Costs on Appeal in Civil Cases

Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum of $250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination of the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

Rule 10.

The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the dis-

trict court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall

be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstate-

ment be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Rule 11.

Transmission of the Record

(a) Time for Transmission; Duty of Appellant. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 10(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangement

with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals.

(c) Temporary Retention of Record in District Court for Use in Preparing Appellate Papers. Notwithstanding the provisions of subdivisions (a) and (b) of this rule, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of Rule 12(a) and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

(d) Extension of Time for Transmission of the Record; Reduction of Time. The district court for cause shown may extend the time for transmitting the rec-

ord. A request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the court of appeals may on motion for cause shown extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given. The district court or the court of appeals may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(e) Retention of the Record in the District Court by Order of Court. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

(f) Stipulation of Parties That Parts of the Record Be Retained in the District Court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) Record for Preliminary Hearing in the Court of Appeals. If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

Rule 12.

Docketing the Appeal; Filing of the Record.

(a) Docketing the Appeal. Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the court of appeals the docket fee fixed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at the request of a party or at the time of filing the record. The court of appeals may upon motion for cause shown enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. An appeal shall be docketed under the title given to the

action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing of the Record. Upon receipt of the record or of papers authorized to be filed in lieu of the record under the provisions of Rule 11(c) and (e) by the clerk of the court of appeals following timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal. If the appellant shall fail to cause timely transmission of the record or to pay the docket fee if a docket fee is required, any appellee may file a motion in the court of appeals to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, the expiration date of any order extending the time for transmitting the record, and by proof of service. The appellant may respond within 14 days of such service. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion without requiring payment of the docket fee, but the appellant shall not be permitted to respond without payment of the fee unless he is otherwise exempt therefrom.